



## A Final Look at Consent to Assignment Agreements

By Gail S. Kelley, P.E., Esq.

An engineer's Consent to Assignment, also referred to as an Acknowledgement and Consent, is usually drafted by the bank providing construction financing for a project. A typical consent requires the engineer to agree that the bank can exercise the rights it has acquired under an assignment from the borrower (the owner); among these rights will be the right to assume the design agreement if the borrower defaults on its loan.

Articles in the June, July and August editions of STRUCTURE discussed some of the concerns with respect to consent agreements, specifically whether the lender is required to pay outstanding amounts due to the engineer, whether the lender has the right to use the plans and specifications if it does not assume the design agreement, and to what information or certifications the lender is entitled. This article takes a final look at some of the provisions commonly found in consent agreements.

### Approval of Modifications and Changes

Often the consent will state that no modifications or changes can be made to the design agreement without the lender's consent. This is not unreasonable, as the assignment gives the lender an interest in the design agreement. Some consents also restrict the engineer's right to perform work on change orders, using provisions such as:

*Engineer shall not perform work pursuant to any change order without first securing Lender's written consent to such change order unless the cost of any single change does not*

*exceed \_\_\_\_\_, and the aggregate amount of all changes does not exceed \_\_\_\_\_.*

Generally, the dollar amounts specified are fairly high, so the minor change orders that often occur towards the end of the design process are not affected. However, if the engineer is just beginning the design and there are likely to be significant changes, a provision like this can affect the engineer's ability to meet the owner's deadlines. In such cases, it is advisable to discuss the provision with the owner. One option would be to edit the provision to include wording such as:

*If Engineer has not received a response to a properly provided notice of a change order within ten (10) days of such notice, Engineer shall be entitled to proceed with such work.*

This requires the lender to act promptly if it receives notification of a change order. Nevertheless, the engineer must remember to provide notice to the lender. Alternatively, the engineer can require the owner to obtain the lender's consent. The following wording could be used in place of the original provision:

*Engineer shall not perform work pursuant to any change order unless Borrower has certified to the Engineer that it has received consent from the Lender.*

### Notice to Lender of Termination

Most consents will prohibit the engineer from terminating the design agreement



As a general rule, the engineer should not be required to allow the lender any more time to cure the default than the owner is allowed under the design agreement. The following is reasonable wording and timing for a termination provision:

*If Borrower defaults under the Design Agreement, Engineer shall not exercise any remedies, including any right to terminate the contract, unless Engineer gives notice to Lender, and Lender fails to either (i) remedy the default within thirty (30) days after receipt of the notice or such longer period as is allowed to Borrower under the Design Agreement; or (ii) deliver to Engineer within such thirty (30) day period an agreement to remedy such default at Lender's expense and, thereafter diligently pursue such remedy.*

If the engineer wants to continue working on the project, the engineer may choose to suspend performance rather than enforcing its right to terminate, as this will allow the entity that takes the project over to assume the design agreement. Nevertheless, having the right to terminate can be an advantage in negotiations.

### The Consideration Clause

One of the basic principles of contract law is that a contract is generally not enforceable in court unless both parties receive something of legal value, referred to as consideration. Thus, a court will typically not enforce a contract for a gift or services of an uncompensated worker. In most contracts, the consideration is a promise from each party. For example, under a design agreement, the owner receives a promise of the engineer's services; the engineer receives a promise of compensation. However, under an engineer's

for default without giving the lender notice and an opportunity to cure the default, which in almost all cases will be the owner's failure to pay the engineer. While this is a reasonable provision, often the consent will give the lender an unreasonably long time to cure the default.

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Consent to Assignment, the lender receives a promise that the engineer will continue to provide its services if the owner defaults on its loan, but the engineer receives nothing in return. In fact, many consents explicitly state that engineer is not a beneficiary of the assignment and the lender has no obligations to the engineer unless, and until, it assumes the design agreement.

To avoid a challenge that the consent is unenforceable, lenders will sometimes include a clause stating that the engineer has received consideration. Standard wording for the clause is:

*This Consent is given by Engineer for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by Engineer.*

This is a so-called “legal fiction” often used in contracts where one of the parties is not actually receiving anything of legal value; the parties agree that consideration has been provided so that the contract will be enforceable. If a party to a contract agrees it has received consideration, a court will generally take the statement as true; it will not ask what the consideration was, or whether it was in fact received.

In some cases, the Recitals at the beginning of the consent may state:

*Engineer will benefit if the Loan is made to Borrower, as a portion of the proceeds of the Loan will be used to pay Project costs, including amounts due and payable to Engineer under the Contract.*

Whether or not the Recitals include such a statement, the consent will invariably include a disclaimer such as:

*Nothing herein shall be construed to confer any present benefits on Engineer or to create any duty upon Lender to see to the application of the proceeds of the Loan or to give any notice of any type to Engineer.*

In other words, while the proceeds of the loan **might** be used to pay the engineer, the lender does not assume any responsibility for the payment.

## Conclusion

Although Consent to Assignments are most often used by banks providing construction financing, they are sometimes used when a development is being done pursuant to a ground lease. In such cases, the owner of the land may want the right to take over the agreements for the project if the developer defaults. Regardless of the party requesting a Consent to Assignment

from an engineer, the main purpose of the consent is to guarantee that the party has the right to assume the design agreement if the owner defaults on its agreement with that party. Consent to Assignments should always be read carefully, as they often contain provisions completely unrelated to the design agreement. Engineers who are not careful may find that, by signing the consent, they have given up valuable rights or agreed to unreasonable obligations. ■

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